IN THE

SUPREME COURT OF THE UNITED STATES

JUNE TERM, A. D. 1923.

No. ~~1118~~ 354

THOMAS A. DELANEY,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals and Brief in Support Thereof.

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Attorney for Petitioner.

CHAMPLIN LAW PRINTING CO., CHICAGO

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Thomas A. Delaney, respectfully represents that on the 26th day of October, A. D. 1921, there were two indictments, Numbers 348 H and 350 H, filed with the clerk of the United States District Court for the Eastern District of Wisconsin, charging the petitioner with the commission of various offenses and with the crime of conspiracy against the laws of the United States jointly with co-conspirators therein named, as follows:

Indictment Number 348 H charges your petitioner jointly with Joseph Guidice, Joseph Dudenhoefer, Sr., Joseph Dudenhoefer, Jr., and Joseph Dudenhoefer Company, a corporation, with a conspiracy to violate the laws of the United States to wrongfully and unlawfully purchase, transport, possess, barter, sell and deliver intoxi-

cating liquor for beverage purposes in violation of the National Prohibition Act, and to wrongfully make and cause to be made records, reports and affidavits in furtherance of such unlawful conspiracy.

Indictment Number 350 H charges your petitioner jointly with Walter Burke, Joseph Ray, Joseph Guidice, Joseph Dudenhoefer, Sr., Joseph Dudenhoefer, Jr., and Joseph Dudenhoefer Company, a corporation, with similar offenses, in practically identical words and terms covering the same period of time.

The overt acts in Indictment 348 H charge your petitioner with having received from Joseph Guidice, a coconspirator, at divers dates and times, large sums of money. Overt acts in Indictment 350 H make similar charges and charge also that your petitioner and Joseph Guidice had conversed and conferred with each other respecting unlawful transactions in intoxicating liquors.

Your petitioner further represents that for convenience the two indictments against him were consolidated and that he was put on trial on March 6, 1922, before Honorable Ferdinand A. Geiger, one of the judges of the said District Court, and a jury, and that on March 10, 1922, the jury returned a verdict of guilty on each of the aforesaid indictments.

Your petitioner further represents that thereafter, on April 5, 1922, a motion for a new trial was made in behalf of your petitioner, and that the same was on that day overruled; and that thereafter, on April 20, 1922, it was ordered that for the purpose of judgment and sentence, cases numbers 348 H and 350 H be considered as one case, and then and there sentenced your petitioner that he be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term of two years, and to pay a fine of $10,000.

Your petitioner further represents that thereafter he sued out his writ of error directed to the said District Court and seeking to review and set aside said judgment and sentence, and that proceedings upon error came on for hearing on January 30, 1923, before the United States Court of Appeals for the Seventh Circuit, which said court was composed of Francis E. Baker, as presiding justice, and Judges George T. Page and Evan A. Evans, as associate justices. That thereafter on February 6, 1923, a judgment was rendered by the said United States Court of Appeals, affirming the judgment and sentence as ordered on April 20, 1922; and that thereafter, on March 19, 1923, a petition for rehearing of the said cause to the United States Circuit Court of Appeals constituted as aforesaid, was denied.

Thereupon your petitioner suggested to his Honor, Judge Francis E. Baker, Chief Justice of the said United States Circuit Court of Appeals, his desire to file a motion in that court seeking to set aside and vacate judgment and orders of said court on the ground that one of the justices constituting said court was disqualified from sitting as such associate justice of said court under section 20 of the Federal Code, in the Statutes of the United States. Whereupon, a rule was entered upon this petitioner to file motion and printed brief in support thereof, and a further rule on the respondent to file a reply brief thereafter and a further order was entered that the said motion shall come for hearing on May 1, 1923. Thereupon the petitioner complied with the rule and order so entered upon him by presenting and filing certified copy of the record showing that Judge Evans participated in hearing of motion and entering orders in the court below, also a verified petition setting forth that the said Judge Evans partook in the deliberations upon the penalty to be inflicted upon petitioner; and on the said May 1,

1923, appeared before the said United States Circuit Court of Appeals and presented his said motion, which was then and there denied.

For the purpose of this petition, your petitioner humbly prays the consideration of this court of but three propositions involved in this cause:

First. Petitioner was denied his right to be confronted by the witnesses against him as provided in Article 6 of Amendment of the Constitution of the United States of America.

Second. The hearing on appeal in this cause was before a court constituted in violation of section 120 of the Federal Code, in the Statutes of the United States, which provides:

> "That no judge before whom a cause or question may have been tried or heard, in a District Court, or existing Circuit Court, shall sit on trial or hearing of such cause or question in the Circuit Court of Appeals."

Third. That there was such a complete failure of proof as to amount to a loss of jurisdiction of the trial court.

First Proposition.

No witnesses were produced who testified to anything of their own knowledge respecting any of the overt acts charged against petitioner.

Joseph Guidice, a co-conspirator, who it is charged in the overt acts had delivered money to this petitioner, had died before the trial. The sole testimony touching the overt acts charged against petitioner was that Joseph Dudenhoefer, Sr., and Joseph Dudenhoefer, Jr., confessed co-conspirators, and one Sherman G. Spurr. The testimony of Joseph Dudenhoefer, Sr., is solely as to

what Guidice had made him believe and what Guidice had said and what his son, Joseph Dudenhoefer, Jr., had said Guidice had said. Joseph Dudenhoefer, Jr., also testified as to what Guidice had told him and what another co-conspirator, Walter Burke, had told witness that petitioner had said. Government witness Spurr testified that he was in the investment bond business and that Guidice had bought from said witness Spurr liberty bonds of the face value of $17,000 and other bonds of the face value of $11,000. This the government attempted to show was with the money supposed to have been given to petitioner by Guidice.

This witness Spurr, further testifies that (Tr. 106), "he (Guidice) rather gave me to understand he was buying them for somebody else," and as to what led the witness to such an inference, he testifies that what Guidice (since deceased) had said was (Tr. 105), "He passed it off in a peculiar way—I do not know if there was any direct statement made." And further, what Guidice said was (Tr. 105), "not anything of any serious nature; it was more of a kidding nature." That is to say, when Guidice told the witness, "in a kidding nature," that he was buying the bonds for "someone else," the inference is that he was buying them for the petitioner. It is noteworthy that no testimony was offered touching other overt acts charged against this petitioner. The sole testimony goes to the overt act charging the petitioner with having received money from Guidice. Both Dudenhoefer, Sr., and Dudenhoefer, Jr., testify that Guidice had told them and had made them believe that he had delivered money to petitioner, and particularly Dudenhoefer, Jr., testifies as to the time and place such deliveries of money to petitioner by Guidice were made. Yet government witness Spurr gives *direct* evidence that Guidice bought bonds with the money supposed to have been paid to peti-

tioner, which is further corroborated by Plaintiff's (Government's) Exhibits 36, 37, 38 and 39. Petitioner desires to avoid any discussion of the evidence, excepting to point out the remarkable failure of proof and the fact that petitioner was denied his constitutional right to be confronted by witnesses against him.

SECOND PROPOSITION.

The prosecution of the petitioner is one of a series known as the *Wisconsin Conspiracy* cases, involving some twenty defendants, and arising from interrelated facts, circumstances and overt acts in which it was charged the petitioner was involved and implicated. The said Arthur Birk was placed upon trial before Honorable Evan A. Evans, one of the judges of the said District Court, in the Eastern District of Wisconsin, and a jury, and on April 12, 1922, a verdict was rendered finding the said Arthur Birk guilty as charged. During the said trial the name of your petitioner was repeatedly mentioned in a prejudicial manner.

On the 12th day of November, 1921, counsel for Walter M. Burke filed a motion to quash indictment number 350 H, which said indictment was found against your petitioner and Walter Burke and others jointly, and it being one of the indictments upon which petitioner was subsequently tried. Said motion came on for hearing on December 17, 1921, before the said Honorable Evan A. Evans, who heard and considered arguments of counsel upon said motion, and thereafter on December 22, 1921, the said Judge Evan A. Evans denied said motion.

Thereafter, on or prior to the 20th day of April, 1922, and prior to the imposition of sentence upon petitioner, this petitioner is informed and believes, the said Judge Evan A. Evans sat with other District Judges, to wit:

Judge Ferdinand A. Geiger and Judge Albert B. Anderson, each of whom had presided at the trials of the respective defendants named in the aforesaid indictments, including the trial of petitioner, and conferred and deliberated upon the penalties to be inflicted upon petitioner. On the said 20th day of April, 1922, at the hour of 10:45 a. m., the aforesaid District Judges, after opening of court in the court room presided over by Judge Geiger, who was the presiding judge at the trial of petitioner, proceeded to and did each pronounce sentence respectively upon the several defendants including petitioner.

The said Judge Evan A. Evans, after having presided at the trial of Arthur Birk as aforesaid, and after having heard, considered and denied a motion to quash indictment 350 H upon which, consolidated with indictment number 348 H, petitioner was tried, and after having, as petitioner is informed and believes, participated in the deliberations as to the penalty to be inflicted upon petitioner, is the same judge who was one of the justices in the United States Circuit Court of Appeals sitting in review of the appeal of your petitioner.

THIRD PROPOSITION.

The record reveals a total failure of proof of the existence of a conspiracy involving petitioner. The government offered no other testimony relating to a conspiracy other than the hearsay evidence of Dudenhoefer, Sr., and Dudenhoefer, Jr., that they had been told or made to believe by Guidice, months prior to his decease, that the said Guidice had made deliveries of money to petitioner. This testimony was followed by *direct* evidence of government witness Spurr that Guidice, contrary to his statements to the Dudenhoefers, had bought bonds with a large portion of the money he had professed to have delivered to petitioner; but that, "in a kidding

nature'' Guidice had intimated he was buying the bonds for ''someone else.'' It is the contention of the government that ''someone else'' was the petitioner.

Petitioner therefore humbly prays that a writ of *certiorari* issue, directed to the said Circuit Court of Appeals of the United States for the Seventh Circuit, directing it to certify to this court all the proceedings that took place before it, and all of the evidence that was offered before it in said proceedings, for review and determination by this court.

Petitioner further prays for an opportunity to present oral argument in support of his petition; and humbly suggests to the court the propriety of issuing a writ of *certiorari* in this cause, for many potent reasons, among which are:

1. Petitioner was denied his right to be confronted by witnesses against him.

2. His appeal was heard before a court constituted contrary to the Statutes of the United States.

3. Because the government's evidence seldom rose even to the dignity of hearsay evidence, but consisted of rumor, gossip and loose speculation.

4. Because there being a total failure of proof as to guilt a grave injustice has been done.

And your petitioner will ever pray.

Laurence M. Shine

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Counsel for Petitioner.

State of Illinois, }
County of Cook. } ss.

Laurence M. Fine, being first duly sworn, says that he is the attorney for the petitioner herein, that he has read the foregoing petition, and that the same is true to the best of his knowledge, information and belief.

Laurence M. Fine

Subscribed and sworn to before me this 19th day of May, A. D. 1923.

Robert D. Mollick

Notary Public.

BRIEF AND ARGUMENT.

Thomas A. Delaney was appointed Prohibition Commissioner in November, 1919, when he was about 33 years of age. He was the first prohibition director of that district. A resident of Green Bay, Wisconsin, since he was nine years old. He was in charge of the PERMISSIVE BRANCH of the department (Tr. 129). There was also an Enforcement Branch over which Delaney had no jurisdiction (Tr. 136). His post of duty was Green Bay (Tr. 137), where he spent half of his time, spending the balance of his time in Milwaukee, excepting when he was engaged in propaganda work (Tr. 132).

After taking office Delaney became acquainted with the Dudenhoefers, who were "among the largest sacramental wine dealers in the west." O'Neill, a co-appointee, Chief Inspector of the Prohibition Department, prior to his appointment had been an employe of the Dudenhoe-

fers for fifteen years (Tr. 75). Guidice and Burke were acquainted with Delaney through their activity in Democratic politics. Ray was a prohibition inspector.

The illegal liquor deals were accomplished by the use of forms number 1410. Legitimately, these forms, in triplicate, were given to a vendee who would make a verified application to purchase, then have the same approved by the Prohibition Department, leaving the original with that department, retaining one copy and giving the distillery the third copy (Tr. 130). THESE APPROVALS WERE MADE BY CLERKS WITH A RUBBER-STAMP SIGNATURE OF THE DIRECTOR (Tr. 130).

The Dudenhoefers testified they had paid almost $100,000 to Guidice for such "coverage permits" (blank forms 1410 bearing rubber-stamp signature of Delaney) and that Guidice told them that he had obtained these permits NOT FROM DELANEY but from Burke, then, when Burke's price was too high (Tr. 80) from Ray. Dudenhoefer, Jr., testifies that he went to Chicago and bought two fictitious notarial seals for the purpose of verification on the false permits. The record is silent as to the part Delaney took or was supposed to take in these transactions.

The government's case against Delaney is based upon evidence of his friendship with Burke, Guidice and the Dudenhoefers. Letters were introduced (plaintiff's 31, 32, 33, 34 and 14) showing the intimate friendship between Delaney and Dudenhoefers, and from these letters and other evidence it appears that Delaney made incessant effort in their behalf in a matter affecting the life of their very large and lucrative business. Attorneys for the government enlarge upon that situation, and point to it in large type on page 24 of their brief in the Circuit Court of Appeals. The government, however, overlooks the fact that for such perfectly lawful service De-

laney neither asked nor received compensation; and that Dudenhoefers, despite the friendship, and the frequent meeting during the progress of the unlawful deals, never by word, hint or gesture, suggested or intimated to Delaney anything regarding them, nor did they seek to learn if he received the money supposed to be given him by Guidice.

From the testimony it does not appear that Delaney was a necessary party to the conspiracy; and raises an inference that the supposed friendship of these parties to Delaney was with a design to direct Delaney's attention away from the illegal traffic.

I.

The right of confrontation, secured by the Sixth Amendment, is a constitutional immunity which cannot be legally denied one accused and tried in the Federal Courts.

South Dakota v. *Hefferman*, 25 L. R. A. (N. S.) 868.
Reynolds v. *United States*, 98 U. S. 145.
Motes v. *United States*, 178 U. S. 471.
Dowdall v. *United States*, 221 U. S. 325.
Diaz v. *United States*, 223 U. S. 442 (p. 450).
Kirby v. *United States*, 174 U. S. 47.

(a) And such right must be exercised in the presence of a court having the power to secure the privilege of cross-examination.

People v. *Murray*, 89 Mich. 276.
Ralph v. *State*, 124 Georgia 81.
State v. *Hefferman*, 25 L. R. A. (N. S.) 876.
2 Wigmore on Evidence, Sec. 1365.

(b) Constitutional provisions should be liberally construed and courts should be watchful for the fundamental rights of the citizen.

Boyd v. *United States,* 116 U. S. 616.

(c) Denial of a constitutional right or immunity will render proceeding a nullity.

In re Hans Nielsen, 131 U. S. 176.

(d) Where the right to cross-examine is extended under circumstances plainly making it impossible to avail of its full benefits, it is in effect denied.

Wray v. *State,* 154 Ala. 36, 15 L. R. A. (N. S.) 493.

Where the physical condition of a witness, called and examined by the state, is such, by reason of extreme illness, as to make it probable that a cross-examination would result in his death, the defendant is justified in refraining from any attempt to cross-examine, although the opportunity is offered by the trial court, and the denial of the defendant's motion to strike out the evidence is reversible error.

(e) The courts cannot suspend nor deny the right of the citizen to any constitutional immunity.

Ex parte Milligan, 4 Wallace, 2.

(f) Where one is deprived of his liberty, from an excess of judicial power, the result is a lack of jurisdiction.

In re Hudgings, 249 U. S. 378.

The record in this cause discloses a flagrant violation of a citizen's right to be confronted with the witnesses against him. Delaney was accused and convicted upon the most palpable hearsay. The right of confrontation is recognized in every state constitution as well as the Federal constitution. It is not a mere idle form which is secured by the organic law of the land, but a real right,

which courts are powerless to withhold. The first ten amendments, collectively regarded as a bill of rights, were adopted because the people of the nation demanded security of the highest order for these rights. Not the least of the rights secured is the right to be confronted with the witnesses accusing. The rights thereby secured are the rights which our ancestors had, through suffering, finally come to enjoy, and which they did not propose should rest upon an insecure foundation. They were declared, then, to be constitutional rights, and, as such they should be jealously guarded and protected by the courts.

The right of confrontation demands that the accused shall have the opportunity to cross-examine his accuser. This is the essence of the right. Deprived of the right to cross-examine the accusing witness, an accused person is, in effect, condemned upon an *ex parte* proceeding.

It is well known that frequently a decisive moral effect results from the mere appearance of a witness in open court, and a defendant is entitled to the full benefit of such moral effect as may appear upon a cross-examination of the witness.

An eminent former justice of this court spoke of the Sixth Amendment as conferring "among the most important rights which are guaranteed by the constitution to a person charged with offences against the United States." He then speaks of the right to be confronted with the witnesses against him and says this means that "no evidence shall be brought against him on his trial made up of depositions, or affidavits, or hearsay statements, but that the witnesses by whom his guilt is to be established shall be brought face to face with him in order that he may see them and hear them, witness their manner of testifying, and so that either by himself or his

counsel they may be subjected to such cross-examination as he may consider of benefit to his interests."

Mr. Justice Miller on the Constitution (pp. 508 and 509).

The case of *Kirby* v. *United States*, 174 U. S. 47, involved the question as to an accused's right to be confronted with the witnesses. A Federal statute purported to make a judgment of conviction against the principal felons evidence against a person charged with receiving stolen property.

The defendant was convicted and appealed, complaining that he had been denied his right to be confronted with the witnesses against him. This court reversed the conviction and said:

> "One of the fundamental guarantees of life and liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that in all criminal prosecutions the accused shall be confronted with the witnesses against him. Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution, with which he had no connection and the evidence in which was not given in his presence. The record showing the result of the trial of the principal felons was undoubtedly evidence, as against them, in respect of every fact essential to show their guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offence, for which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases. The presumption of the innocence of an accused at-

> tends him throughout the trial and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt. * * * But that presumption in Kirby's case, was in effect held in the court below to be of no consequence; for, as to a vital fact which the government was bound to establish affirmatively, he was put upon the defensive almost from the outset of the trial by reason alone of what appeared to have been said in another criminal prosecution with which he was not connected and at which he was not entitled to be represented" (pp. 55, 56).

In *Boyd* v. *U. S.*, 116 U. S. 616, this court considered certain provisions of the revenue laws and held them to violate the Fourth and Fifth Amendments and said that unconstitutional practices get their first footing "by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In *Dowdell* v. *U. S.*, 221 U. S. 325, the substance of the Sixth Amendment (as embodied in the Philippine Bill of Rights) was considered. The court said:

> "This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits,, and particularly to preserve the right of the accused to test

the recollection of the witness in the exercise of the right of cross-examination" (p. 330).

See

Mattox v. *U. S.*, 156 U. S. 237.
Kirby v. *U. S.*, 174 U. S. 47.
Wigmore, V. 2, 1396-1397.

In *Motes* v. *U. S.*, 178 U. S. 458, the defendants were charged with a conspiracy to injure a citizen in the exercise of his rights. Taylor, a defendant, at preliminary hearing testified and his evidence was reduced to writing and signed by him. At the trial Taylor disappeared, just before the case was called. The written evidence of Taylor was sufficient, if accepted, to establish guilt of all defendants.

The other defendants had a chance to cross-examine at the preliminary hearing. (See pp. 470, 471.) The court notes that, at time of Taylor's statement, there had been no proof of a conspiracy (p. 471).

The court held the admission of Taylor's statement to be a violation of the accused's rights to be confronted with the witnesses, citing Cooley Const. Lim., Sec. 218.

II.

Judge Evans could not legally sit in the Court of Appeals and its judgment, as a result, is void.

Regina v. *The Justices*, 6 Queens Bench 753.
Queen v. *Justices*, 18 Q. B. 416.
Oakley v. *Aspinwall*, 3 N. Y. 547.
American Construction Co. v. *Jacksonville*, 148 U. S. 372.
Cramp v. *International Co.*, 228 U. S. 645.
Rexford v. *Brunswick*, 228 U. S. 339.
Moran v. *Dillingham*, 174 U. S. 153.
People v. *Connor*, 142 N. Y. 130.
Van Arsdale v. *King*, 152 N. Y. 69.

The verified petition of Delaney, presented to the Court of Appeals (and incorporated in the transcript of the record), set forth facts, not disputed, from which it appeared that Mr. Justice Evans sat in the trial court in the consideration of matters closely related to the facts involved in the charges against Delaney. In fact, Judge Evans took part in the deliberations which resulted in the fixing of the penalties awarded the convicted persons, including Delaney. He thus became disqualified to sit in a court of review; and his disqualification became absolute, because of the prohibition of a Federal Statute, and could not depend upon any circumstances from which a waiver could be implied.

Judge Evans also heard, considered and adjudicated a motion to quash Indictment 350 H. Had Judge Evans granted the motion to quash, it would have had the effect of adjudicating the cause as to all defendants named in the indictment. The denial of said motion, likewise, was an adjudication.

Petitioner was condemned by a court constituted in direct violation of a statute, mandatory in character. The language of this court in *McClaughry* v. *Deming*, 186 U. S. 49, in discharging upon habeas corpus one convicted by a court-martial, is very significant. It was held that the court-martial was constituted in violation of law, and therefore, had not the power to convict. It was said:

> "It was therefore in law no court. The men were disqualified to act as members thereof, and no challenge was necessary, for there was no court to hear and dispose of the challenge. It is unlike an officer who might be the subject of challenge as under some bias. A failure to challenge in such a case might very well be held to waive the defect, and the officer could sit and the finding of the court be legal."
>
> "But this is not the case of a personal challenge of some member of the court where an objection to his

> sitting might be thus particularly raised. It is an objection that the whole court as a court was illegally constituted because in violation of the express provision of the statute, and the challenge to the whole court is not provided for by the statute. But it is said defendant did not object to being tried by this illegally constituted court, and that his consent waived the question of invalidity. We are not of that opinion. It was not a mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. This consent could no more give jurisdiction of the court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians or of women. The fundamental difficulty lies in the fact that the court was constituted in direct violation of the statute, and no consent could confer jurisdiction over the person of the defendant or over the subject-matter of the accusation, because to take such jurisdiction would constitute a plain violation of law. This consent had no effect whatever in the face of the statute, which prevented such men sitting on the court. The law said such a court shall not be constituted, and the defendant cannot say it may, and consent to be tried by it, any more than he could consent to be tried by the first half a dozen private soldiers he should meet; and the decision of neither tribunal would be validated by the consent of the person submitting to such trial" (pp. 65, 66).

This court then refers to the opinion in the leading case of *Oakley* v. *Aspinwall*, 3 New York 547, approved the principle there announced, and said:

> "A judge who is prohibited from sitting by the plain directions of the law, cannot sit, and the consent that he shall sit gives no jurisdiction. This is the doctrine of the above case. It has been followed without doubt or hesitation in the State of New York ever since its rendition in 1850" (p. 68).

In *Cramp* v. *International Curtiss Co.*, 228 U. S. 645, Section 120 of the Judicial Code which prohibits a judge sitting in trial court, from sitting on hearing in court of

appeal, was considered and it was held reversible error, although the trial judge merely entered a *pro forma* decree, without consideration of the matter.

Rexford v. *Brunswick*, 228 U. S. 339, is to the same effect. Here the attorney for a party stated there was no objection to the trial judge sitting.

See also:

Am. Const. Co. v. *Jacksonville*, 174 U. S. 153.
Slater v *Willegs*, 16 App. D. C. 369.
Moran v. *Dillingham*, 174 U. S. 153.

In *Am. Const. Co.* v. *Jacksonville*, 148 U. S. 372 the trial judge sat in review. The Supreme Court said:

> "The more important suggestion is that the decree of the Circuit Court of Appeals is void, because Judge Pardee took part in the hearing and decision in that court, though disqualified from so doing by Section 3 of the Judiciary Act of 1891, which provides that 'no justice or judge, before whom a cause or question may have been tried or heard in the Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals.'
>
> "The question whether this provision prohibited Judge Pardee from sitting in an appeal which was not from his own order, but from an order setting aside his order, is a novel and important one, deeply affecting the administration of justice in the Circuit Court of Appeals. If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or by certiorari."

The sitting by Judge Evans in the Court of Appeals, after having participated in some of the proceedings in the court below, was a mistake. "Such mistakes are not uncommon," said the New York Court of Appeals (*Van Arsdale* v. *King*, 152 N. Y. 69). "But litigants,

particularly persons charged with crime, have a right to have their case determined by a court constituted according to law."

The Court of Appeals has only the jurisdiction conferred by statute. "The Circuit Court of Appeals is a court created by statute and is not endowed with any original jurisdiction" (*ex parte Craig*, 282 Federal, 138, p. 143). Its jurisdiction was, therefore, strictly limited and placed squarely under the prohibition that no judge having heard a cause in the trial court, or "a question" arising therein, could sit in the court of review. The power of decision, in other words, was withheld from him, and effectually denied him. The Court of Appeals had no authority to render any judgment. The accused was protected by an express, mandatory provision of the statute, which denied judicial power to Judge Evans, while sitting in the Court of Appeals. Within the meaning of the opinion in *ex parte Nielsen*, 131 U. S. 176, "he was protected by a constitutionel provision, securing to him a constitutional right. It was not a case of mere error in law, but a case of denying to a person a constitutional right; and where such a case appears on the record, the party is entitled to be discharged from imprisonment. * * * A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. * * * In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the constitution, which bounds and limits all jurisdiction."

III.

The finding of guilty, not based upon any legal evidence, is manifest error, calling for reversal.

In re Watts, 190 U. S. 1 (p. 35).
Hyde v. *Stine*, 199 U. S. 85.
Tinsley v. *Triat*, 205 U. S. 20.
Chin Yow v. *U. S.*, 208 U. S. 8.
Kwock Jan Fat v. *White*, 253 U. S. 454.
Ex parte Craig, 282 Federal, 138 (p. 154).

(a) The admitting hearsay evidence was highly prejudicial to defendant.

Logan v. *United States*, 144 U. S. 263.
Brown v. *United States*, 150 U. S. 98.
Sorenson v. *United States*, 143 Federal, 821.
Leady v. *United States*, 280 Federal, 864.
Heard v. *United States*, 225 Federal, 829.
Harrington v. *United States*, 267 Federal, 97.
Heaton v. *United States*, 280 Federal, 697.

(b) This court will reverse, in a case of this character, although formal objection to harmful evidence may be considered as not properly made.

Crawford v. *United States*, 212 U. S. 183.
Clyatt v. *United States*, 197 U. S. 207.
Wiborg v. *United States*, 163 U. S. 633.
Weems v. *United States*, 217 U. S.

(c) A state of proof consistent with innocence demands a reversal.

The record may be searched in vain for any direct evidence tending to implicate Delaney in guilt. Rumor and idle gossip have wrought the ruin of an innocent man and only the action of this court can, in a measure, restore to him the priceless boon of freedom. There is a

total failure of proof to show guilt. The result would be grotesque if it were not so tragic to a man who has been made the victim of misguided official zeal upon the the part of the Federal officials.

In the case of *ex parte Craig*, 282 Fed. 138 (p. 154), it is said:

> "It must be admitted that, where an examination of the record shows no legal evidence to sustain a conviction, lack of jurisdiction exists" (citing 190 U. S. 1).

In *Leady* v. *U. S.*, 280 Fed. 864 (8th Cir. Ct.) the court admitted in evidence statements made by alleged co-conspirators, after commission of offense. The defendant was convicted and its judgment was reversed. It was said:

> "It is quite obvious that Leady would not and could not have been convicted if this incompetent and highly prejudicial testimony, which was mere heresay, had been excluded."

See, also,

Heard v. *U. S.*, 225 Federal, 829.
Harrington v. *U. S.*, 267 Fed. 97.

Heaton v. *U. S.*, 280 Fed. 697, where evidence that alleged bribe giver had withdrawn $1,000 from bank (in absence of defendants) was admitted by the trial court and was held to be error for which judgment was reversed.

The record in this cause presents a very exceptional case. The total failure of proof to show the guilt of Delaney, followed by his conviction, suggests a very singular situation and strongly emphasizes the necessity of guarding against the impairing of the most sacred rights of man through careless attention as to the manner or method of procedure. It may be that it will be stated

that objection to the harmful evidence, or rather, the idle and vicious hearsay which was admitted, was not specific enough. This court will, however, reverse in cases of exceptional hardship, particularly where there is no adequate proof of guilt.

In *Wieborg* v. *United States*, 163 U. S. 633, the court held that there was no adequate proof of guilt, and, although no motion was made to instruct in favor of the defendant, the judgment of conviction was reversed.

It was a grave error to admit evidence as to what alleged co-conspirators had said regarding the part Delaney is alleged to have taken. This was no part of the *res gestae*. It was purely narrative; and it must be very obvious to any inquiring mind that if such harmful and illegal matter were eliminated from the record, there would remain no evidence whatever, which could create the remotest suspicion of guilt.

An instructive case is *Clyatt* v. *United States*, 197 U. S. 207. There the accused was convicted of a violation of the statute against peonage. No motion was made to instruct the jury to find the defendant not guilty, and yet this court felt justified "in examining the question in case a plain error has been committed in a matter so vital to the defendant" (p. 222).

The indictment in that case alleged that defendant had caused certain persons to be "returned" to a condition of peonage. The proof did not show a *former* condition of peonage and failure to prove a *return* to such a condition was held fatal (p. 222).

In *Sullivan* v. *United States*, 283 Federal, 865, the verdict and judgment of conviction were held to have no basis except suspicion. The defendant had been convicted of a violation of the Anti-Narcotic Act. The Cir-

cuit Court of Appeals (Eighth Circuit) reversed defendant's conviction. It was said:

> "All the evidence, if any there was against him, was circumstantial. * * * When the record in this case is carefully read and deliberately considered, it leaves no doubt that the only real basis for the verdict and judgment, the indictment and prosecution in this case, was suspicion. * * * Fortunately, the law sternly forbids the conviction of the accused upon suspicion."

The case at bar discloses a gross violation of the constitutional right of the defendant to be confronted with the witnesses against him. If there had been a statutory provision to substitute hearsay evidence, such evidence would have been improper and inadmissible under the authority of *Kirby* v. *United States,* above referred to. Congress itself cannot sanction the violation of the Sixth Amendment by allowing the substitution of hearsay evidence in place of the sworn evidence of witnesses offered in open court, in the presence of the accused. It is manifest that Congress has no such power and it therefore must be obvious that the ruling of the trial court in admitting such evidence, and the Court of Appeals in approving of such evidence, constitute reversible error.

In Conclusion.

With all proper deference to the governmental agencies concerned in the prosecution in this case, we insist that the result attained in the conviction of Delaney is a grave judicial mistake, such as is probably unparalleled in the history of American jurisprudence. Human fallibility seems never so disastrous as in the enforcement of criminal justice which results in the abasement of an innocent young man raised in affection for his country, con-

fidence in its laws and pride in its courts. An enormous hardship and injustice has been inflicted upon Delaney wholly unwarranted by any legal evidence. We submit that, upon the record, this court should declare his conviction unsupported by the evidence, and that the judgment of the trial court and the Court of Appeals should be reversed.

Respectfully submitted,

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